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September 1, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, N.W.
Washington, D.C. 20554

Re: Permitted *Ex Parte* Contact, CC Docket Nos. 99-68, 96-98

Dear Ms. Salas:

The purpose of this letter is to disclose a permitted *ex parte* contact between undersigned counsel on behalf of Global NAPs, Inc., and certain Commission personnel with regard to the issue of reciprocal compensation for ISP-bound calls pending in the above-referenced dockets. Specifically, on August 30, 2000, undersigned counsel, accompanied by Ms. Brenda Boykin of my office, and Mr. William Rooney, Jr., General Counsel of Global NAPs, met with Common Carrier Bureau Chief Attwood and Mr. Jack Zinman and Ms. Tamara Preiss of her staff.

We discussed two issues: the appropriate jurisdictional theory to apply to ISP-bound calls, and the "right answer" on the merits.

First, Global NAPs directed the Commission personnel's attention to the technical data in the record which show that more than 90% of the actual connect time between an end user and a dialed-up ISP consists of signaling that never reaches into "the Internet" beyond the ISP's modem. As a technical matter, therefore, applying the traditional "end-to-end" jurisdictional test to dial-up calls to ISPs would logically lead to the conclusion that a substantial majority of such traffic is jurisdictionally *intrastate*, even if it is not disputed that the (relatively small) portion of the signaling that conveys data between an end user and a distant web site is jurisdictionally *interstate*.¹ Given the contentious nature of the overall subject matter, Global NAPs suggested

¹ This record evidence was alluded to in Global NAPs' July 21, 2000 Comments in this matter, at page 29 note 32.

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that reliance on the traditional “end-to-end” test in these circumstances would likely lead to ongoing industry confusion and both state and federal regulatory litigation, which Global NAPs assumes the Commission hopes, in its final order in this matter, to avoid.

To address this concern, Global NAPs suggested that the Commission apply a slightly different jurisdictional approach, grounded in the Communication Act’s definition of “the Internet.” Specifically, Section 230(e)(1) of the Act defines “the Internet” as “the international computer network of both Federal and non-Federal interoperable packet switched data networks.” Under this definition, “the Internet” is viewed as an integrated whole — and an “international” whole to boot. Viewed as an integrated whole, “the Internet” is clearly interstate and international — and, therefore (to the extent it or its infrastructure is regulated at all), under this Commission’s exclusive jurisdiction. From this perspective also, an ISP’s modems, which are used to answer incoming dial-up calls, would constitute the “outpost” of the Internet vis-à-vis the PSTN. Under this approach, it follows from the Internet’s inherently international/interstate nature that connections *to* the Internet (which, from this perspective, is essentially a massive, jointly-provided, interstate/international private network) are under this Commission’s exclusive jurisdiction. Asserting jurisdiction over ISP-bound calls on this theory would eliminate the need for complex estimates of how much time, or how many packets, or what proportion of CPE-generated non-random signaling, is interstate vs. intrastate.²

Second, we discussed the “right answer” with regard to the classification of ISP-bound traffic under Section 251(b)(5). Global NAPs noted its view (with reference to its July 21, 2000 Comments) that ISP-bound traffic clearly should be classified as “local” traffic for purposes of intercarrier compensation under Section 251(b)(5). We discussed the problems that would arise if some separate “Internet only” intercarrier compensation rate were to be established, and the corresponding benefits of treating ISP-bound calls as “plain old” local traffic. Briefly, with respect to ISP-bound calling, ILECs are “monopsonists,” *i.e.*, buyers with monopoly control of the purchasing side of the market. ILECs purchase call termination services from CLECs who serve ISPs, on behalf of the ILEC customers who are calling the ISPs. Just as monopolists unfairly increase their profits by reducing output and charging high prices, monopsonists unfairly increase their profits by obtaining the goods and services they need at unreasonably low rates — even, in this case, a rate of zero if they can get away with it. Ghettoizing ISPs and ISP-bound traffic with a differential, lower rate of compensation, as some have suggested, would simply be playing into the monopsonists’ anticompetitive strategy of obtaining unfairly low rates for the services they buy.³ On the other hand, by establishing a regime in which the rate that ILECs must pay to terminate ISP-bound (local) calls their customers originate is the same as the rate that ILEC will receive when CLECs send local calls to the ILEC (including calls to ISPs served by the ILEC), the ILEC will face real pressure to establish lower, cost-based rates for its own call termination services. This, in turn, will facilitate local competition by lowering the cost to CLECs of offering traditional POTS service to customers with substantial outgoing usage. In this connection we noted the

² This jurisdictional approach was noted (with references to the record where it is explained more fully) in Global NAPs’ July 21, 2000 Comments in this matter at page 29, note 32.

³ This point was discussed in Global NAPs’ July 21, 2000 Comments in this matter at 5-6 and 14-16.

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apparent downward trend in arbitrated and negotiated call termination rates applicable to all traffic (*i.e.*, in states where ISP-bound calls are treated as local), but an apparent resistance to lowering such rates in other locations (*e.g.*, Massachusetts) where ILECs have been able to resist paying for ISP-bound call termination services. Finally in this regard, we discussed alternatives for bringing call termination rates applicable to ISP-bound calls into line with true ILEC-cost-based call termination rates in cases where an existing agreement might not provide for such a rate.⁴

If you have any questions about this matter, please do not hesitate to contact the undersigned at 202-828-9811.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a long horizontal line extending to the right.

Christopher W. Savage

cc: Ms. Attwood, Ms. Preiss, & Mr. Zinman
Mr. Rooney

⁴ We also noted that the Commission might want to direct that future agreements establish a two-part rate structure for local call termination, with a "call set-up" element and a "subsequent minute" element. This approach would more accurately reflect the costs of *all* classes of local calls, and would eliminate differences in average call length for voice vs. ISP-bound calls as a contentious issue, since all calls would be rated according to the same two-part rate structure. This point was discussed in Global NAPs' most recent Comments and Reply Comments in this matter, including the affidavit of Lee L. Selwyn attached to Global NAPs' Reply Comments.